No. 11879

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

MARION JONCICH, JOE C. MARDESICH and ANTOINETTE BOGDANOVICH,

Appellants,

vs.

ANDREW XITCO, JR.,

Appellee.

APPELLEE'S BRIEF.

HERBERT R. LANDE,
413 West Seventh Street, San Pedro, California,
Proctor for Appellee.

Parker & Company, Law Printers, Los Angeles. Phone TR. 5206.

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Counter-Statement of Facts.

On the night of January 9, 1947, the Pioneer hit a rock ledge known as Two-Rock Point, off Laguna Beach, California, while going at 8 knots. She went on the rocks the full length of her keel, was broadside to ground swells, and rocked with them. The North Queen came up within 20 minutes of the distress call of the Pioneer. The North Queen found over half of the bow out of the water, and the water line at the bow was above the water a distance estimated at from three to five feet [A. 80-85]. The North Quen came up to the rocks and kelp and took a 5/8" wire cable from the Pioneer, turned around and proceeded to pull.

The first pull by the North Queen was a "direct pull" [A. 101, 135], caused by the North Queen pulling straight ahead in the direction the master thought the Pioneer went on the rocks. The 5/8" cable snapped at once, but before it broke, it put an "awful strain" on the rigging [A. 102].

The North Queen then called for more wire cable from the Pioneer. The reason for the additional cable was that the master of the North Queen thought that the greater length would extend from one vessel to the other in a large semi-circle, or "scoop" as he called it, and thus would have a lot of spring to it and less liable to break when a strain was put on it [A. 104].

Then Matt Berry, a crew member of the North Queen who had extensive salvage experience with the U. S. Navy in the South Pacific during the last war, and the master, Xitco, changed the tactics of the North Queen. Instead of pulling in a straight and direct manner, the North Queen was swung from side to side, exerting a pull from side to side, as well as backwards, on the Pioneer.

Xitco, the master of the North Queen, described the maneuver as follows [A. 104, 105]:

> ". . . we turned 10 to 15 degrees to starboard and then to port, keeping the boat going this way and then that way, the same as a crow-bar, so that we could wheel her out. We started pulling that way for 15 or 20 minutes and she finally come off. . . . we were pulling on an angle and swinging it."

The vessel swung back and forth between positions A and B on libelant's diagram [Exhibit 2] [A. 106]. She was always moving, never in a stationary position.

As testified by Matt Berry [A. 137]:

> ". . . I went up on the bridge with the master of the vessel, and we decided that inasmuch as we couldn't pull the vessel off with a direct pull of the 5/8-inch wire, we would attempt to pull her off by using a series of diagonal tows, and we started first to the right, and we got to a certain position of leverage, we would give it a full throttle, and then swing again to port and again give it the full throttle. We worked on the theory of a lift or bar, of squirming the vessel off the rocks. And after towing that way 10 or 15 minutes, I noticed it seems to slack the wire, which is a sign that the vessel had moved; and since the wire had slacked, I knew she had moved and I told the master I believed the vessel had moved. Then we started again on the next angle and the vessel seemed to give a lurch and came straight off."

Subsequent inspection of the hull when Pioneer was drydocked disclosed extensive damage to the vessel's bottom [A. 18], and that the screens on the sea suction, six feet above the keel, were smashed [A. 213-216], and the propeller blades were bent.

I.

The Record Will Not Substantiate the Claim of Appellants That There Was Effective Aid Available to the Pioneer, Other Than the North Queen; and the Court Committed No Error in This Regard.

A. There Is No Evidence in the Record as to Availability of a Tug From San Pedro, and None That the Sunlight Could Have Effectively Aided the Pioneer.

Appellants make much of the fact that another vessel, the Sunlight, came up to the scene of the wreck. The Sunlight arrived after the North Queen had commenced salvage work [A. 26, 37, 125, 150].

The Sunlight was another purse seiner such as the North Queen and Pioneer. She had a 5/8" wire cable on board.

But it does not appear that the master of the Sunlight, or anyone else on board, had the know-how or ability for salvage that Xitco and Berry of the North Queen possessed [A. 138]. If the Sunlight had merely put its 5/8" cable on board the Pioneer, and pulled on it, which is the way one would ordinarily adopt, the straight pull on the small cable would have broken it [A. 101, 103, 135]. There is no evidence that the Sunlight would have asked for 75 fathoms or more of cable [A. 103, 104, 137], so as to give the cable a cant as it stretched between the vessels and thus act as a spring, or that the Sunlight would have used a maneuver of pulling from one side to the other of the stranded vessel and working it loose while at the same time exerting a pull [A. 104, 105, 106, 137, 138].

The amount of effective help that the Sunlight could have given the Pioneer is a matter of pure surmise and

conjecture, and for that reason cannot be an important factor in this case.

The subject of help from San Pedro for the Pioneer is a matter that was not gone into at trial. No testimony was given bearing on this subject. The Court may take judicial notice of the fact that San Pedro was about 30 miles from Laguna, but the Court may not take judicial notice as to whether or not, on the night in question, tugboats were in fact available for salvage service, the length of time it would have taken to contact the agents or masters of such a tug, the length of time it would take to assemble a crew at night, the length of time it would take the tug to finally get to Laguna. The Pioneer was in extreme danger during the five to six hours after her stranding [A. 108 to 113, inclusive]. She needed immediate aid to save her. She could not afford to wait until the next day for a tug [A. 153-158, 161].

B. Availability of Other Assistance Is Just One of the Factors to Be Considered in Making a Salvage Award.

The availability of other assistance was not stated to be one of the "main ingredients in determining the amount of the award" in *The Blackwall,* 10 Wall. 1, 19 L. Ed. 870, 77 U. S. 14.

Appellants did not prove that during the crucial hours any other vessel was available *that was manned by seamen so skillful that they could use a fishing vessel and a 5/8" wire cable to pull the Pioneer off the rocks.* The record is clear that ordinary seamanship could not do the job [A. 101, 102], and without use of great skill, a 5/8" cable could not stand the strain, nor was a purse seine fishing vessel powerful enough.

In *De Aldamiz v. Theo. Skogland & Sons,* 17 F. (2d) 873, cited by appellants:

> "The evidence is far from being convincing that any of the other three ships in the vicinity of Fronteree *was capable of saving the ship in distress,* or was willing to take the risk of doing so."

The next case cited by appellant, *Societa Commerciale Italiana Di Nor. v. Maru Nav. Co.,* 280 Fed. 334, the Court said (p. 337):

> "Whilst we hold, as above stated, that the relations between the two vessels were not such as to deprive the St. Charles of the right to compensation, we are nevertheless of opinion that those relations imposed on each of them a degree of moral obligation to assist the other in case of need. Besides, it was to the obvious advantage of the St. Charles to render prompt aid when the accident happened. It was against orders for her to proceed without an armed convoy, and her officers were unfamiliar with the coast along which lay her course. This, then, is not the case of assistance which is at once voluntary and against self-interest, but distinctly the case of assistance which, although voluntary in a legal sense is at the same time of direct and important benefit to the one by whom it is rendered. *And this essential difference should be reflected in a materially less award than otherwise would be allowable."* (Emphasis added.)

In the next case cited by appellants, *The John J. Howlitt,* 256 Fed. 971, there was "other *and effective aid."* page 972, at hand; so effective that the *other* aid put the fire out, libelants standing by.

In *The Livietta,* 242 Fed. 195, cited next, a reading of the entire case will disclose that the element of other assistance was not a prime factor in inducing the Court to reduce the award. The opinion mentions that argument in a makeweight fashion, but the main discussion was on the elements of danger involved.

The Peru, 99 Fed. 783, was a case involving a vessel tied up at an oil loading dock. At the time of the fire, there were two tugs on the spot. The other tug was even a larger and better equipped tug than the salvor.

> "The tow was unusually deliberate. There was little strain upon either the vessel or the crew. If it had not been for the fire, the labor performed would have merely supported a claim for towage, and this would have been fully compensated by the payment of $50.00. But I cannot help being influenced by the value of the property saved, and by the imminence and seriousness to which she was exposed. The tug is not valuable and was in little danger, but she certainly saved the ship, either from destruction or from the loss of many thousands of dollars."

The Court awarded the tug $2,500.00. The value of the ship saved was $60,000.00. It must be considered that the case arose in 1898. In the case at bar there are considerations of extraordinary skill which were not present in the case above cited.

The High Cliff, 271 Fed. 202, cited next by appellant, is not in point. It involved a barge adrift in New York Harbor, which was towed to safety by a tug. The Court said:

> "It has long been settled in this circuit that salvage services *rendered in harbor cases, where tugs are abundant* and on the ground or nearby, are not serv-

> ices of a high order. . . . The mere towing to safety a drifting barge or scow is usually regarded as salvage service of a low order of merit, and is compensated by a small award."

Cuyamel Fruit Co. v. Bostrum, 19 F. (2d) 10, contains nothing that can be of assistance here.

The Roman Prince, 88 Fed. 336, involved a fire in the hold of a vessel tied up to a dock in New York. The salving tug saw the smoke and came up within 5 minutes and put a hose aboard. The city fire department's fire engines came up within 5 to 10 minutes after the tug, and the fire engines did actually assist in the extinguishment of the fire, which facts distinguish the case from the one at bar.

The Marie, 39 Fed. 501, is likewise a case involving harbor tugs and their availability to the distressed vessel. The ability of the tugs to aid was not in question.

The Plymouth Rock, 9 Fed. 413, also involved a tug boat. Concerning the work done by it, the Court said:

> "She was prosecuting in her own port the business for which she was in part designed and was in the ordinary pursuit of her employment, and she suffered no loss or injury in rendering the service; and neither the difficulty nor the personal labors or hazards of the salvors themselves greatly, if at all, exceeded those in cases of ordinary towage in rough weather; and other tugs were either near at hand or within a few hours call. *Many of the important circumstances, therefore, which often go to increase the amount of salvage compensation, are either wholly wanting in this case or exist only in a comparatively small degree."*

The Santa Barbara, 299 Fed. 152, again involved harbor tugs at Baltimore. The only reference in the case to other assistance is in the following part of the opinion:

> "In fixing the allowance made, the Court has not been unmindful of the fact that the service should be treated as a salvage of a low order of merit, by reason of its being a harbor service, with other assistance at hand. Nor has the fact that the city fire boats participated in the rescue been lost sight of."

It is, therefore, submitted that a reading and analysis of the opinions in the cases cited by the appellants reveals that the cases do not support the appellants' claim that the availability of other assistance is a highly material factor in determining the amount of a salvage award. In some of the above cases, as noted, the availability of other assistance was involved, but in none of the cases was it considered a highly material factor. Instead, it is submitted, the Courts considered it as a subsidiary factor, not to be ignored, but not to be given great weight. Furthermore, in most of the cases where the availability of other aid was considered by the Court, the Court had before it a case of salvage in a harbor where tugboats were available, equipped for heavy tows and salvage, and whose business it was to do the type of work in question. Appellees submit that it is not a fair comparison to consider such cases as authorities for a rule that is to be applied in a case involving salvage on the high seas by a fishing vessel not equipped or rigged for towing or salvaging, by a vessel which voluntarily gives up its night's fishing operation to help a distressed vessel, in a situation where only by the use of exceptional skill and seamanship can a rescue be effected with the limited means at hand.

As this Court said in *The Wahkeena,* 56 F. (2d) 836, 838:

> "The primary consideration in salvage cases is the amount of benefit conferred." *The Nord Alexis* (C. C. A. 2), 273 Fed. 160, 162. "See, also, *Ehrman, et al. v. The Swiftsure,* (D. C.) 4 Fed. 463, 467, 468."

C. No Substantial Evidence of the Availability of Other Effective and Timely Assistance Having Been Given, It Was Properly Not a Factor to Be Considered in Determining the Award.

As the record stands, the evidence is that the Sunlight came up to the scene of the wreck some time after the North Queen had commenced salvage work on the Pioneer and at about the same time that the final and successful maneuvers of the North Queen were made. The evidence is that the Sunlight was equipped with a 5/8" cable [A. 34] and that the North Queen was a larger vessel than the Sunlight [A. 28].

Now, the first movement of the North Queen was a pull on the Pioneer, in a direction the master of the North Queen thought the Pioneer went on the rocks. This would be the usual and ordinary method of attempting to pull her off. It is the method that we must presume the master of the Sunlight would have used, had he joined in the efforts. But under this method of a direct pull, the small 5/8" cable promptly snapped. Even with two lines aboard, there is no evidence whether or not the cables would have held or parted. There was no evidence of the condition

of the Sunlight's cable. It was used only for pursing the net, so what it would have done under a heavy pull is not known.

It seems evident from the Trial Court's opinion that he considered the first attempt of the North Queen to be usual and ordinary seamanship. The Trial Court stated [A. 51]:

> "The first movement was unsuccessful, and in my judgment, it is there (and then) that the high degree of skill has been established."

The combination of a vessel, a 5/8" cable, and a master and crew with ordinary seamanship, was not enough to save the Pioneer. It required one more element, one thing in addition, to take the North Queen and her cable and transform them into an effective salvor for the Pioneer. That plus factor was, in the words of the Trial Court:

> ". . . the experiences of the man who directed the operations for the second effort to extricate the Pioneer were of a very high order in my judgment. They showed exceptional skill, according to the evidence, based upon experience of a high type of value in a situation such as that which confronted the Pioneer at the time. I think the maneuver in utilizing the principle of the lever showed real seamanship *in extremis*. If the pull had been straight, as it probably was primarily, there is a good deal of doubt under the evidence as to whether the operation would have been successful. So that there was this high degree of skill manifested after the line parted, which, in my judgment, shows an exceptional skill in this operation."

The experience of the man who directed the operations for the second effort (Matt Berry) appears in the record frm pages 130 to 132, and 137 and 138, of the Apostles in Appeal.

There is not a scintilla of evidence that anyone on the Sunlight had this type of experience or knowledge. For all that appears in the record, the Sunlight lacked a master or crew possessing such extraordinary and exceptional skill in seamanship that could effectively and successfully save the Pioneer.

Therefore, the Trial Court was justified in attaching little weight, if any, to the presence of the Sunlight in determining the award to the North Queen.

D. Supposing That the Sunlight Had Helped the North Queen in Salving the Pioneer, Would That Have Decreased the Amount of the Award?

Appellee questions the very basis for appellants' assumption that the availability of other help, the vessel Sunlight, would be cause to reduce an award to the North Queen.

Suppose the Sunlight had helped the North Queen in salving the Pioneer, and that a libel for salvage had been filed by the two vessels against the Pioneer. Would not the fact that two vessels were employed *increase* the award, because of their greater combined value and greater risk the two took and time they both lost?

Certainly if two vessels were employed, there would be no reason to decrease the award.

II.

The Trial Court Properly Estimated and Considered the Danger to the North Queen.

A. The Trial Court Properly Estimated and Considered the Danger to Salvor as a Factor in the Award.

The evidence shows that the Pioneer was stranded upon submerged rocks. Off Laguna Beach there is a rock ledge point that is submerged [A. 85]. The evidence also was that around this submerged rock ledge there was an extensive bed of kelp [A. 81]. The night was dark, the moon was not up as yet.

As the North Queen came up to the Pioneer, she had to be careful that she did not run up the same rocks that stranded the Pioneer [A. 91].

Also, the pull on the Pioneer had to be made with the bow of the North Queen pointed seaward. This would ordinarily mean that the stern of the North Queen would be facing the Pioneer, and to get in that position, the North Queen would have to back up to the Pioneer. But if the master of the North Queen did that, he ran too great a chance of hitting his propeller against the rocks and disabling his vessel, too. So he came in bow first, and took the line from the Pioneer, backed out to safety, turned his vessel and took the line from the bow to the stern [A. 91, 92]. The Sunlight also apprehended danger, for the master of that vessel stated that he came as close to the Pioneer as he "dared" [A. 27].

The Trial Court properly evaluated the above circumstances, for in his opinion, he said [A. 50-51]:

> "We must bear in mind that the libelant vessel was not equipped for salvage purposes. She was a fish-

> ing boat, and that factor should not be lost sight of in evaluating the type of service which she rendered to the disabled ship. She responded to the call, and in doing so, while probably not placing herself in a great peril on account of the distance separating the two vessels at the time of the first movement, *there was a good deal of danger to be apprehended in going close to the obstacles in the pathway, which had caused the Pioneer to become fixed on the rocks.*" (Emphasis added.)

The above portion of the Court's opinion certainly shows an appreciation of the degree of danger to the North Queen and the decree is certainly entitled to the presumption that the same was considered in fixing the amount of the award.

B. The Record Is Clear That There Was Danger to the Salvor During the Salvage Operation.

The testimony of the master of the North Queen was that his vessel approached within 200 feet of the Pioneer when the line was first taken [A. 91]. Berry testified that the vessel came to within 300 or 400 feet, on account of the kelp and rocks. The North Queen then backed out, and the danger from the rocks was over.

The North Queen was a purse seine fishing vessel. She was not equipped or built for salvage work. To use her for this salvage required skill and experience of an exceptional character. In part, such skill involved the rigging of the line from the North Queen to the Pioneer in such a manner as to enable the North Queen to be free to

maneuver, from side to side when working the Pioneer free.

The North Queen had a large sardine net on the turntable aft [A. 92-103]. The line from the Pioneer had to be lifted and held above the net, and then fastened to the bitts of the North Queen, which were just aft of the midship house [Libelant's Exhibits 4 and 5]. This method of rigging the towing cable endangered the entire rigging of the mast and boom and the men working under them. However, the danger was one that was necessary in order to give maneuverability to the North Queen [A. 121-125, 136]. The boom and mast could have come down and endangered the lives of the crew [A. 102, 212].

As to the cases cited by appellants:

The Tordenskjold, 255 Fed. 672, involved a tugboat that passed its tow line to the distressed vessel, encountered no danger in going up to the stranded ship, in fact she lay along side of her all night, and the tugboat was built and equipped to do the pulling that subsequently pulled the vessel free.

The Hesper, 18 Fed. 692, is far from the facts of the instant case—the Court stated, page 699, that:

> "The labor and skill furnished were of the ordinary kind, such as libelant's boats (tugboats) were seeking as ordinary employment."

In the cited case, the tug of libelant refused to take the risk of hauling out an anchor to help the distressed vessel. The Court further stated that but for an admission of the

respondent's proctor, the Court would have considered the case as towage and lighterage, to be compensated on principle of *quantum meruit.*

The Lucia, 222 Fed. 1015, likewise involved a pull by a commercial tug. No exceptional skill or seamanship was used by the salvor.

C. Danger to the North Queen Having Been Shown by Evidence in the Record, and Appreciation Thereof Having Been Demonstrated by the Trial Court, There Is No Cause for Reduction of the Award.

Each salvage case must be considered on its own facts. In some salvage cases, especially those involving commercial tugboats built and equipped for heavy pulls and tows, which cases appellants seem to cite especially, the element of skill and seamanship in the rigging of the tow lines and use of the vessel's equipment is not a factor at all in the saving of the distressed ship. The tugboats have extremely heavy hawsers which are made for heavy pulls. The tugboats are built with heavy bitts, placed to the stern, which allow the tug free maneuverability. In the tugboat cases, the element which most often calls for praise is that of danger to the tugboat.

But in this case, we have a light 5/8" wire cable, used to purse a fishing net, upon a vessel with light rigging, sufficient only for fishing.

It is submitted that the Trial Court was correct in deciding that the exceptional skill and seamanship of Xitco and Berry of the North Queen were responsible for the prompt freeing of the Pioneer.

Danger to the North Queen there was, but in *this* case, as contrasted to the tugboat cases cited by appellants, skill, seamanship and prompt action were the most important single factors.

In the case of *The Miskianza,* 27 F. (2d) 734, cited by appellants, the Trial Court had held that the tugboat-salvor had damaged itself through the master's fault and denied cost of repairs. The Circuit Court of Appeals held that the situation was dangerous, and that a salving vessel should be justified in working in dangerous waters, without too nice regard for her own safety. The Court raised the award because of this and because it thought the element of danger to the tugboat had not been evaluated, and because of the success of the operation and value saved. The case is far from being an authority for appellant's statement that danger to salvor is the most important single factor in determining the award. The distressed vessel was in a sand bar.

The Tordenskjold, 255 Fed. 672, contained no element of danger, skill, seamanship or anything that the Court could rely upon to justify the award. The work was done by a commercial tugboat that took care of its own tows at the same time it helped the distressed vessel.

Nor is *The Hesper, supra,* next discussed by appellants, any nearer on the facts. Appellants compare an award of $4,200.00 made in 1883 with a $12,000.00 award in 1948! The Circuit Court found that the salvage services rendered were of the lowest grade; also, the *Hesper* went aground on *sand.*

The next case cited by appellants, *Ulster S. S. Co. v. Cape Fear Towing & Transportation Co.,* 94 Fed. 214, is a tugboat case involving a vessel grounded on *sand.* The Court said, page 217:

> "With the exception of the two occasions when the anchor was towed out . . . the work consisted of taking a line and tugging at the Torr Head. All of this work was done in fine weather and smooth sea, and without damage or particular risk to person or property. *The business of these boats was to seek towage in the waters where they were working on the Torr Head* . . . and both boats were engaged in their ordinary vocations during the whole time of this service."

If such service was worth $6,500.00 in 1899, the award here is certainly on the conservative side. The salvage operations were directed *solely* by the master of the Torr Head. The Circuit Court regarded this as most important.

In *The Santa Rosa,* 5 F. (2d) 478, the vessel ran aground *on a sand bar* at entrance to Charleston Harbor. Commercial salvage tugs worked on her and eventually pulled her free. There were no circumstances of danger, so that phase of salvage was not involved in the case. The award of approximately $50,000.00, which was about 5% of the salved value of $744,000.00 was *not* reduced by the Circuit Court. As values go up, percentages naturally must fall. The Circuit Court had this to say about the matter (p. 480):

> "The law properly controlling in the reduction of and increasing salvage awards is in appellate courts well settled, and we need go no further than cite the recent decision of this Court in *The Naiwa,* 3 Fed.

(2d) 381, a salvage case from the Eastern District of Virginia, and the cases therein cited. An Appellate tribunal should not disturb a salvage award by a trial court, although it may feel that, if sitting on such court, a different allowance would have been made, unless convinced in what was done some principle of law was violated, or there was a plain and manifest error in the exercise of discretion in the conclusion reached."

The citation of *The Lucia,* 222 Fed. 1015, again is to a commercial tugboat that performed its usual work without incurring danger or exhibiting usual skill and seamanship. $4,000.00, in 1915, was a good award. Again, this case involved a stranding on a *sand bar,* and the danger to the distressed vessel was not anywhere near as great as if she were on the rocks.

In *Rodrigues v. Bagalini,* 17 F. (2d) 921, next cited by appellants, the award of $1,700.00 on $17,000.00 salved value was reduced to $500.00 upon the ground that the salvers were guilty of extreme bad faith.

To sum up, the Trial Court did properly evaluate the danger to the Pioneer stranded on rocks and the danger to the North Queen; that in this particular case, the feature which the Court properly gave primary consideration was the skill and seamanship that were so promptly used to save the Pioneer from pounding her bottom on the rocks; and that the citation of cases involving commercial tugboats and vessels stranded on sand bars are not helpful here.

III.

The Court Did Not Err in Finding That the Pioneer Was in Extreme Peril. The Weight of the Evidence Was That the Pioneer Should Have Been Pulled Off the Rocks Immediately to Avoid Fatal Damage. The Weight of the Evidence Was That the Pioneer Would Not Have Freed Herself With the Remaining Rise in Tide.

A. It Was Very Improbable That the Pioneer Could Have Freed Herself With the Rising Tide.

The evidence is without dispute that the Pioneer was traveling at about eight knots per hour [A. 195] when she struck the rock ledge known as Two Rock Point. The Pioneer ran up on the rocks for the full length of her keel, from stem to stern [Answer to Libelant's 9th and 10th Interrogatory—A. 18]. At the time libelant came up to her at 7:30 P. M., the water line at the bow of the Pioneer was somewhere between one to five feet out of the water [A. 52, 90, 132]. The Court thought [A. 52] that the true distance the bow rose out of the water when the Pioneer ran upon the rocks was somewhere between those two figures, at 7:30 P. M.

The tide tables showed that from 5:30 P. M. to midnight, six and one-half hours, there was a 5½ foot rise in tide.

The North Queen came up at 7:30 P. M. At that time there was ⅔ of the rise remaining, or three feet, eight inches, not five feet, as appellants state.

Considering that the testimony which supports the decree was that the bow was from three to five feet out of the water at 7:30 P. M., it is extremely doubtful if the remaining rise in tide would have been sufficient to float

the Pioneer, assuming that she would have sustained no damage in the intervening 4½ hours.

However, it was during the ensuing hours that the Pioneer was in mortal danger.

The testimony on this vital point was as follows [Testimony of Andrew Xitco, Jr., R. 109-114]:

> "Q. Now, in your opinion, what could reasonable have been expected to happen to the Pioneer if she had not promptly been pulled off the rocks and freed on the night you found her there? A. If she wasn't pulled off and the tide was flooding, why, she would have a tendency to roll more and bounce more on the rocks below.
>
> Q. And what would be the effect of bouncing and rolling on the rocks? A. It would puncture her sides and fill her with water. All she has is 2½ and 2½" planking.
>
> * * * * * * * *
>
> A. Yes, and it is very important. If she would stay for a little longer, you couldn't tell, she might puncture right there through her bottom, and her bottom showed it wouldn't be long before she filled with water, just as a purse seiner we saw that went on at Point Arguello and the boat could have saved her, but the insurance company sent the tug and by the time she come back there, the owner lost the boat, a $75,000.00 boat.
>
> Q. Were the circumstances of that stranding similar to the Pioneer being stranded down here, a little? A. Yes.
>
> The Court: You passed by at the time of the disaster?
>
> The Witness: We come by in the morning. It went on in the early part of the morning, and the

salvage tug was on its way up there. But I was on the rocks over at Clemente Island on the leeward side of the island. We went on the rocks after the tide went out, and as the tide started flooding, we started rolling around and we had severe damage on our hull as we towed in." [A. 113.]

"Q. By Mr. Lande: Now, assuming he went on at around 7:00 o'clock, that is, the Pioneer went on the rocks at around 7:00 o'clock, what effect would the rise in tide have upon the danger that the Pioneer was in? A. Well, as the tide started flooding, she would be in more danger. As we found her, as she stopped, she was practically fastened to the ground, and as she keeps getting on more water she would start rolling and moving up and down, and as the tide kept flooding, it would be getting worse.

The Court: Would she be worse with a flooding tide than with a receding tide?

The Witness: Yes.

The Court: Why?

The Witness: Because when she come on she stopped, and then as the water started coming in and kept rising, she would start floating a little, a part of the ship keeps rising.

The Court: Suppose the tide was receding, wouldn't it be the same?

The Witness: She wouldn't move at all. If she come on at high tide, in a matter of two or three hours she would be the same as lying aground,—because she was fastened there."

[Testimony of Matt Berry]:

"Q. Mr. Berry, in your opinion, what danger could reasonably be expected to the Pioneer if she

weren't promptly freed off the rocks that she was stranded on? A. I believe that with the rise in the tide and the slight increase in buoyancy that the Pioneer would suffer a greater damage to her hull, due to the position of the Pioneer on the rocks.

Q. What do you mean by 'due to her position'? A. Her position just almost horizontally to the beach, and due to the ground swell, the slight increase in the tide and the greater buoyancy, it would mean greater pounding against the rocks, and possibly could capsize, and the rocks just might puncture her hull in that type of vessel. Then their nets are all in one piece, and if the ship ever capsizes or sinks, that net will go down and sink, as she has no chance to free herself, which has been proven before.

Q. Was time an important element in freeing the Pioneer? A. I believe that time was an important element in freeing her.

Q. Explain to the Court why. A. Well, the longer that vessel stayed on the rocks and the more pounding she did, the more danger she would sustain to her hull, and, therefore, time was an important element." [A. 138, 139.]

"A. I said the vessel was rolling from side to side in my earlier testimony, and I believe the roll was from 5 to 10 degrees. With the rise in tide and the slight increase in buoyancy, the vessel is going to roll in a greater arc, and as she rolls in a greater arc she is going to do more damage to her hull because it was pounding on the rocks." [A. 142.]

"A. If you asked me to form an opinion, as I told you, I said in the additional four hours in that rise in tide I didn't believe it would cause enough rise to float that vessel. I don't believe so." [A. 143.]

"The Witness: That is correct. I assume that because of the vessels that I worked on in salvage when they were left on the rocks and there was an increase in tide, and they would always sustain more damage than if they were pulled off immediately. That is what I base it on. I base my statement on past experience. That is the only thing I have to go by, is past experience in similar cases." [A. 144.]

[Testimony of Captain Myron Varnum, A. 154-161];

(Captain Varnum was given a hypothetical question giving the facts of the libelant's case, and then asked the following question):

"Q. Now, Captain, assuming that to be the situation of the vessel when stranded on the rocks, in your opinion what damage to the vessel could reasonably be expected to follow from the stranding? A. If she was left on there she would pound her bottom out.

The Witness: I said if you left her on there, on the rocks, and she was rocking on there, there was nothing to stop her from breaking her planks in and damaging her planks so that she would be a total loss if you did not take her off.

Q. Now, assume, Captain, that she went on at about 6:30 and assume that aid came to her at 7:30, and assuming now that your low tide was from 5:30 and from 7:30 on, as the tide rose a matter of maybe three or four feet, explain, please, how that rise in tide would affect the pounding of the vessel and working of the keel on the rocks, and the working of the surf, and of the ground swells on the vessel. A. Well, the tide is lifting the ship and gives her more buoyancy and so she pounds harder until she floats or pounds her bottom out and fills with water.

Q. Was time an important element in a situation like that, of the vessel I gave you in the hypothetical question? A. Absolutely.

Q. Now, explain to the Court what you mean by that. How much time, minutes or hours or what? A. Well, I mean this, that he should get help as soon as he could to get off the rocks, and in the meantime, if help weren't coming, he should do what he could to get her off himself. But that is the first thing they should do, to try to get the vessel clear, and I would blame him if he didn't.

Q. In other words, in your opinion, Captain, could the master of that vessel, so stranded, with reasonable safety have waited for the high tide to float himself off? A. Well, I wouldn't have waited, if I could have got help. Anyway, he wasn't sure he could get her off at all with the help he did have.

The Court: Assuming after this salvage operation that the disabled vessel made her way to San Pedro under her own power without any difficulty. What would you say, then, about the imminency of her being destroyed by remaining on the rocks?

The Witness: Well, your Honor, it was the master's place to get the ship off the rocks just as soon as he could, in any way that he could, and the insurance underwriters would uphold him in doing it. If he had left her there he wouldn't know what would happen, he wouldn't know how much damage was under her, she might have punctured herself at any time and be a total loss.

The Court: Assuming that the disabled vessel after the incident that caused her to become stranded upon the rocks was extricated from the rocks and made her way to her port without any further assistance herself after she had been released from the rocks, would you think that the damage that had en-

sued to her bottom was such that she couldn't have been raised by the tide had she remained on the rocks?

The Witness: Well, I couldn't estimate that because you don't know how much damage was done while the tide was rising. As it was rising, she was going to pound harder." [A. 154-161.]

Cross-Examination of Captain Fritz A. Scheibe (Appellant's Witness) [A. 218-219]:

"Q. Isn't it a fact, Captain Scheibe, when the vessel first went on the rocks, whether it was the Pioneer or any other vessel, and she strikes hard at low tide, she is held more or less securely in a grounding, isn't she? A. It depends on the condition of the bottom.

Q. All right. Let's suppose it is a rock bottom. A. Yes.

Q. And the vessel that goes aground shows damage along the entire keel way back into the rudder, and from the bow to the rudder,— A. That's right.

Q. —when she first goes ashore, she is held securely, isn't she? A. That's right.

Q. Now, if you have an incoming tide, so that you are getting a little buoyancy and there is a ground swell that is broadside, then your vessel begins to rock, doesn't it? A. Yes.

Q. And then she begins to work? A. Yes.

Q. And that is when the damage occurs, isn't it? A. Some damage occurs then, yes.

Q. Well, the amount of damage, of course, you don't know, do you? A. No.

Q. If there is enough buoyancy and enough ground swell, and if the rocks are present in the right position, she can puncture and flood and be a total loss? A. That's right.

Q. *So you don't know, Captain Scheibe, that before she came free, and we are talking about the Pioneer,—* A. *Yes.*

Q. *—before she came free at high tide, you wouldn't know between the time she got stranded and high tide whether or not she would be punctured?* A. *No.*

Q. *She could very well have punctured, couldn't she?* A. *If there were rocks in that area, she could very well have punctured.*

Q. You know under the hypothetical question that there were rocks in that area, don't you? A. I was told to assume there were rocks in that area. *If there were rocks in that area, she could have punctured, yes.*

Q. *Very easily?* A. *Yes.* (Emphasis added.)

Q. Probably if the vessel showed damage where her suction pumps were, even under the circumstances that did exist? A. Yes." [A. 218, 219.]

Thus, it appears from the testimony not only of the libelant and his witnesses, but also from the testimony of the respondent's expert that the Pioneer was in extreme danger and it was imperative that she be freed from the rocks as soon as possible to avoid mortal damage. Such being the case, the master of the Pioneer could not take the chance of waiting to see whether or not his vessel would go free at high tide, or sink in the meantime. The argument of appellants would have more sense to it if the grounding were on a sand bar, but in this case the grounding was on rocks, and judging from the fact that during the brief time the Pioneer was on the rocks the screens over the sea suction plates were damaged by coming in contact with rocks, and the tips of the propeller blades

were damaged by coming in contact with rocks, the Pioneer was amongst an uneven rock formation and the probabilities are that she would have punctured her hull before midnight.

B. The Pioneer Tried to Free Herself and Failed.

When the Pioneer first went on the rocks, she tried to get free herself, but did not move [A. 170]. Whether she could have waited for high tide, and whether high tide would have taken her off, or whether she would have in the meantime punctured and flooded, is a matter of pure conjecture. The Trial Judge said:

> "So we have the peril of a ship that was *in extremis*. She was on the rocks. Whether she was fast or whether she was extricable is a pure matter of conjecture. The fact is she was extricated by the efforts of the libelant." [A. 50.]
>
> ". . . I think the major factor was the maneuvering of the vessel, the salvor, and that had it not been for that movement the consequences that ensued to the disabled vessel might have been very serious. How serious I think is a pure matter of conjecture." [A. 52.]

The situation is similar to the one in *The Wahkeena*, 56 F. (2d) 836, where this Court said:

> "We likewise concur with the view that 'The Court can only speculate as to whether the "Wahkeena" would have come off the jetty with the turn of the tide, and, if so, whether she would have been picked up by some other boat before again stranding.' "

The *Ulster* case, cited by appellants, is not in point. The case involved stranding on a *sand bar*. The vessel had an anchor and cable heavy enough to do the job, and

the bottom was sand, upon which the anchor could hold. But the uncontradicted evidence of Captain Varnum was that the light anchors of the Pioneer would not have held on the rock bottom, unless by chance they caught on a rock's projection [A. 224-226]. Furthermore, in the *Torr Head* case, the opinion states clearly that "the real services which put the Torr Head afloat were rendered by the master and crew of the Torr Head, using her machinery and appliances."

Surely that statement cannot in any fairness be said of the present case before the Court. The Trial Court found that it was the North Queen's services which put the Pioneer afloat, and there is no evidence that the machinery, appliances, master or crew of the Pioneer had any hand in the rescue.

The physical evidence in this case is that the Pioneer was amongst uneven rocks, and that the damage done by the rocking of the vessel, and the damage done in the stranding, was very extensive [A. 18—Answers to 9th, 10th and 11th interrogatories]. The cost of repairs was $16,432.20.

The damage to the hull extended over the entire length of the keel, and the propeller blades and screens on sea suctions all showed damage. The screens on the sea suctions were about six feet high on the vessel's side up from the keel. That is definite proof that the vessel was rolling near rocks which were extremely close to the sides of her hull, and that another movement could very easily have punctured the hull.

The man who surveyed the damage was Captain Scheibe. On cross-examination he admitted [A. 215-219] the extreme peril of the Pioneer and that she was in danger of having her hull punctured at any moment.

"Q. This vessel was rocking quite a bit, wasn't it, to smash the sea suction screens? A. Yes, and it didn't crush them. It crushed the strainers.

Q. In order to crush the strainers she had to get over that far? A. Yes.

Q. Now, on your keel, that keel is 16 inches deep? A. Yes.

Q. And half of that was damaged? A. Yes.

Q. It takes a tremendous amount of rocking on those rocks to damage 8 inches by 12 inches of solid pine, does it not? A. A good bit of that might have been torn up when he went aground. I don't know.

Q. It not only damaged his keel, but he had his hardwood and his iron shoe underneath damaged. And what did you say happened to that? A. It was torn off.

Q. It was torn off? A. Yes. That is spiked on.

Q. Now, this damage to his propeller blades, that would mean that his ship would have to roll enough so that the propeller blade would come in contact with the rock on the sides; isn't that right? A. That's right.

Q. And that propeller blade is protected underneath by the keel shoe? A. That's right.

Q. So that we know, then, that the boat not only rocked enough to do damage to the suction knobs, but also to the propeller, as she rocked from side to side? A. *It could have been rocking and a rock be in the vicinity of the propeller.*

Q. Isn't it a fact, Captain Scheibe, when the vessel first went on the rocks, whether it was the Pioneer or any other vessel, and she strikes hard at low tide, she is held more or less securely in a grounding, isn't she? A. It depends on the condition of the bottom.

Q. All right. Let's suppose it is a rock bottom. A. Yes.

Q. And the vessel that goes aground shows damage along the entire keel way back into the rudder, and from the bow to the rudder,— A. That's right.

Q. —when she first goes ashore, she is held securely, isn't she? A. That's right.

Q. Now, if you have an incoming tide, so that you are getting a little buoyancy and there is a ground swell that is broadside, then your vessel begins to rock, doesn't it? A. Yes.

Q. And then she begins to work? A. Yes.

Q. And that is when the damage occurs, isn't it? A. Some damage occurs then, yes.

Q. Well, the amount of damage, of course, you don't know, do you? A. No.

Q. If there is enough buoyanacy and enough ground swell, and if the rocks are present in the right position, she can puncture and flood and be a total loss? A. That's right."

The next case cited by appellants is the *Edith L. Allen,* 129 Fed. 209. It is distinguished from the present case for the reason that here there can be no doubt of the extreme danger to the Pioneer. Not only the testimony of Xitco, Berry and Varnum established such danger, but even the appellants' "expert" witness, Scheibe, the surveyor, admitted the danger and the damage sustained from that danger during the short time before the Pioneer was pulled free.

Therefore, the question as to whether the Pioneer could free itself depended upon conflicting evidence, that the Trial Court's conclusion in this matter cannot be disturbed on appeal. The evidence is without conflict that the Pioneer was in mortal danger subsequent to the stranding. The evidence amply supports the Finding of Fact that the "efforts of the North Queen and crew were the prime and major factor which resulted in the freeing and extricating of the Pioneer from the rocks." [A. 59.]

The Pioneer could not afford the risk of waiting for the high tide. She was in such danger, stranded amongst rocks and rolling broadside to the ground swells, that she may never have seen high tide—except from the bottom of the sea. This was a *real and existing danger,* a danger which had already done $16,430.00 of damage to her hull, a danger which had already reached the sides of the vessel (damage to screens on sea suctions, six feet up the hull from the keel; and damage to the propeller, which could only have resulted from hitting rocks on the *side* of the propeller, as the underneath is protected by an extension of the keel).

The finding that the Pioneer could not free herself by her own means is fully supported by the testimony of her master [A. 170]. He tried to back up three times and couldn't get off. His anchors were not used; even if they had been, they were too light [A. 19] for use on the rock bottom, he would merely have heaved them home; the chance that they might catch on a rock is too indefinite to compel a finding contrary to the Court's finding in this regard [A. 224-226].

IV.

The Loss of a Night's Fishing Was a Detriment to the North Queen.

The North Queen was a purse seine fishing vessel whose value, including net, was $135,000.00. She carried a crew of eleven men. This vessel, representing such a large investment, was engaged in fishing for sardines during the regular sardine season, as was the Pioneer. The North Queen gave up a night's fishing to go to the aid of the Pioneer. True, no one knows what the North Queen would have caught in her nets. But the *chance* to fish that night was of economic value to the North Queen, and it was that chance to catch fish which was lost.

The Court rightly considered this factor when he said [A. 53]:

> "In any event, there was no evidence excepting the fact that an inference is fair, I think, that a fishing boat of that size with a crew of eleven men, going down in those waters to fish on lays, would not have been out less they felt there was a fair prospect of a catch that night. The catch was abandoned because of the desire to assist in saving the ship after she had been disabled."

The next case cited by appellants is that of *Atchison, T. & S. F. Ry. Co. v. California Sea Products Co.*, 51 F. (2d) 466, which is distinguished from the present one in that the cited case involved a floating whale factory, a new business and wholly untried, that the libelant had never been engaged in whaling in the San Clemente waters or that anyone else had, and that there was no evidence that

whaling was a seasonable occupation in San Clemente waters. In the present case, the North Queen was engaged in fishing operations for sardines in the midst of the season, as were the Pioneer and the Sunlight, in the waters involved. As to such a situation, this Court in its opinion referred to the case of *The Columbia,* Fed. Cas. No. 3,035, where allowance was made for the catch lost because the accident happened "at the height of the fishing season."

V.

The Exceptional Skill and Seamanship of Appellee, and the Extreme Peril of the Pioneer, Were the Outstanding Characteristics of the Salvage Operation.

A. The Crew of the North Queen Handled Her With Exceptional and Unusual Skill and Seamanship, Which Resulted in the Freeing of the Pioneer.

The appellants make the statement that the services of the North Queen involved "nothing extraordinary or unusual."

The Trial Court made a finding, VI and VIII [A. 57-59], that by the use of great skill and ingenuity, the master and crew of the North Queen were able to pull the Pioneer off the rocks, and that the services rendered were of a high order of merit; that their manner of working the vessel off the rocks showed real seamanship in an emergency and exceptional skill based on experience of a high type; and that such efforts were the prime and major

factor which resulted in the freeing and extricating of the Pioneer from the rocks.

What has been written in this brief so far of the evidence amply supports the Court's finding. The testimony of Xitco [A. 101-120], Berry [A. 135-140] and Varnum [A. 151-164] fully justifies the Court's finding. As Berry said [A. 138] of the technique used by the North Queen:

> "I learned that by experiment in similar salvage operations. I learned that in the salvage of LSMs and LCTs, vessels that were stranded on the mud and on the coral beaches and we had difficulty in taking those vessels off in amphibious operations. So we experimented with that theory, and that was the theory we used on the Pioneer. We found it very successful in the Philippines."

That the rising tide was only a contributing factor, the Court so decided. The Trial Court said [A. 52]:

> "I feel that the buoyancy of the sea itself was a contributing factor, but the movement of the leverage maneuver was, I think, the prime cause of extricating the Pioneer. I believe the result was partially assisted by the buoyancy, but the movement of the sea itself, during the tide period that was involved in the movement. How much each contributed it is difficult to say. I think the major factor was the maneuvering of the vessel, the salvor, and that had it not been for that movement the consequences that ensued to the disabled vessel might have been very serious. How serious I think is a pure matter of conjecture."

The Naiwa, 3 F. (2d) 381, next cited by appellants, involved the services of the salvage tug of Merritt and Chapman. Salvage was her business, and the business of libelants in that case. In the present case, it was the skill and seamanship, over and above that of fishermen, that enabled Xitco and Berry to save the Pioneer. What could be usual and expected skill in a salvage company like Merritt and Chapman, would be most unusual and unexpected in the master and crew of a fishing vessel. The award made by the District Court was for $67,500.00 on a salved value of $1,200,000.00; about 5%.

In *The Professor Koch,* 260 Fed. 969, next cited by appellants, involved a vessel that had struck a ledge lightly and slid into a depression on it, which held it like a cradle with no immediate danger. The libelant was in the tugboat business, and in answer to a telephone call, he sent two tugs out to the vessel to help her, and a third later at high tide. The three tugs pulled her free easily. She was taking water, however, so they beached her and later moved her inside the breakwater. After her hull was patched and she was pumped out, she was towed to Boston. The District Court thought it was (p. 970) "essentially a towing operation" and allowed the tugs $10,000.00, which was over four times the commercial rate for the hours involved. There was no element of exceptional skill or seamanship in the *Koch* case that makes it at all comparable to the one at bar.

The danger and peril of the Pioneer has been discussed by appellee under Point III above.

VI.

The District Court Did Not Err in That It Made an Award That Was Appropriate and Proportionate to What Courts Have Heretofore Awarded in Like Cases.

A. The Criteria to Be Followed by Appellate Court.

The criteria to be followed by the Circuit Court in passing upon the amount of the salvage award has been well stated in the case of *The Naiwa* (C. C. A. 4th), 3 F. (2d) 381:

> "This court undoubtedly has the right in an admiralty case to increase or decrease the amount of the salvage award made by the trial court, but the principles upon which this should be done are well and definitely settled, viz., that because we think that perhaps as trial judges we would have reached a different conclusion from the one arrived at, still that should form no basis for our disturbing the finding, unless under all the circumstances we are convinced that the court whose judgment is under review was so far in error as to have violated some principle of law or had plainly erred in exercising its discretion in fixing the amount of the allowance. This is the correct rule by which we should be guided, and authorities to support the same are readily at hand, indeed, the question is fully covered by recent and previous decisions of this court (citing cases)."

B. The Award Is in Line With the Decided Cases of Salvage.

Appellees will first analyze the cases cited by appellants; however, decided cases have a limited use in determining the amount of an award. As stated in the case of *The Craster Hall* (C. C. A. 5th), 213 Fed. 436, 437:

> "To determine whether services rendered to a ship in peril are strictly salvage services, and whether

> salvors are entitled to be rewarded therefore in admiralty, adjudged cases are of great help in reaching a correct decision, and the same may be said to many other questions arising in salvage cases; *but, where the amount of award is the only vital question, very little assistance is obtained by study and analysis of the facts in other salvage cases.*" (Italics added.)

In *The Bay of Naples* (1891), 48 Fed. 737, the salved value was $81,400.00 and an award of $12,000.00 was made by the Court, approximately 17%.

In *Canadian etc. v. U. S.* (1925), 7 F. (2d) 69, the Court said of the salvor's services: "The service was of almost the lowest order of salvage; it was a simple harbor service. . . ." Any award made could not fairly be used as a measure of comparison in this case.

Huasteca Pet. Co. v. 27907 Bags of Coffee, 60 F. (2d) 907 (1932), involved a cargo of a stranded vessel. On $343,000.00 valuation of cargo, the District Court awarded 20%, which was reduced to $30,000.00, or about 10%, on appeal. The facts of that case and the present one are not similar.

In *Simpson v. Dollar,* 109 Fed. 814, the District Court found that in "rendering the services for which salvage was claimed, no extraordinary effort was put forth by the Columbia (salving tug), and that neither the tug nor any of her crew was exposed to the slightest danger in making fast to the steamer or towing her to a place of safety; that the ordinary charge for such towage would be about $175.00." An award of $7,000.00 was made, but that case is far from the facts of the present one.

In *The Hesper,* 18 Fed. 692, the Court said, page 699:

> "The labor and skill furnished were of the ordinary kind, such as libelants' boats (tugboats) were seeking as ordinary employment."

The Court further stated that but for respondent's admission, it would have considered the case one of towage and lighterage, to be compensated for on principle of *quantum meruit.* The case is typical of those cited by appellants as authority for their argument that the present award exceeds "those which have been customary for like services." How can an award of $4,000.00 made in 1883 be compared, dollar for dollar, with an award made in 1948?

Also cited is *The Lucia* (1915), 222 Fed. 1015, involving a pull of a commercial tug, not incurring any danger and not exhibiting any particular skill or seamanship; *Ulster S. S. Co. v. Cape Fear etc.* (1899), 94 Fed. 214, has been analyzed as to its dissimilar facts, and $6,500.00 in 1899 was worth more than three times that sum in 1948. In the case of *De Aldamitz v. Theo. Skogland & Sons* (1927), 17 F. (2d) 873, an award of $5,000.00 was made on salved value of $60,000.00. The proportion of $5,000.00 to $60,000.00 is much the same as $12,000.00 is to $112,567.00. But, when the $5,000.00 of 1927 is adjusted to its 1948 value, the sum paid for the services was much greater in 1927.

On the relative value of the dollar, the Fourth Circuit Court had this to say when comparing salvage awards in 1918 in *The Kia Ora,* 252 Fed. 507, 511:

> "It is to be considered also that the award of $100,000.00 was of hardly more value or greater encouragement for such service than an award of $50,000.00 would have been ten years ago."

In *Simpson v. Dollar* (1901), 109 Fed. 814, next cited by appellants, the Court recognized the award as too low, so why use the case as a measure for comparison?

Salvage awards cannot be compared only upon the basis of values involved. As stated in the *Blackwell, supra,* there are five other elements that must be considered, yet throughout appellants' brief this elementary mistake is made. Typical illustrations are the next two cases cited by them, *The Tordenskjold,* 255 Fed. 672 (1918), where there was involved no element of skill, seamanship or danger, or anything else the Court could rely upon to justify the award. The work done by a commercial tugboat that took care of its own tows while engaged in helping the distressed vessel; and the *Societa, etc., v. Maru Nav. Co.* (1922), 280 Fed. 334, where the Court expressly stated that (p. 337):

> "This, then, is not the case of assistance which is at once voluntary and against self-interest, but distinctly the case of assistance, which, although voluntary in a legal sense, is at the same time of direct and important benefit to the one by whom it is rendered. And this essential difference should be reflected in a materially less award than otherwise would be allowable."

Yet the appellants compare the awards in such dissimilar cases with the one before the Court now.

The next case cited by appellants is that of *Richfield Oil Co. v. Currey, et al.* (C. C. A. 9th), 55 F. (2d) 875. The element that greatly impressed the trial court, as expressed in his opinion in 47 F. (2d) 235, was the readiness to assume danger in going to the aid of the burning vessel. The salving vessel was a commercial tug, and she towed the vessel from the dock into the open waters of the

harbor. The Trial Court awarded $11,000.00 salvage and said, 47 F. (2d) at p. 238:

> "The award has been lessened by the grossly exorbitant demand of the crew in the ship's arrest, $150,000.00, and also the excessive claim of the tug, 'one-fourth of the ship's value' . . ."

We do not know what the award would have been if the demands were held to be reasonable. So how can that case be compared to this? Furthermore, even with the above depreciating factor in the cited case, $11,000.00 in 1931, at the depths of the depression, was worth well over twice that in terms of 1948 buying power. This Court said, 55 F. (2d) at p. 876:

> ". . . it is obvious that Judge Neterer, who tried the case in the court below and who has had a wide experience in admiralty law, gave full and careful consideration to all the elements properly involved in determination of the salvage awards (citing cases). In *Malston Co. v. Atlantic Transport Co.* (C. C. A.), 37 F. (2d) 550, 571, the court said: '. . . We would not be justified in reversing his findings unless we are prepared to say that they are clearly wrong, which, under the record here, we certainly could not do. His findings are supported by evidence, and, while there is some evidence to the contrary, it is not such as would justify a reversal.'"

Appellants next cite, as a "somewhat similar case," *The St. Charles* (E. D., Va.), 254 Fed. 509 (1918). The distressed vessel was stranded on a sand bar. The salvor came to her aid and promptly pulled her off. The District Judge said (p. 510):

> "The wind was moderate, the sea smooth, and good weather conditions generally favorable to the success-

> ful completion of the service, prevailed. *No particular skill was required,* nor hazard or danger incurred." (Italics added.)

The Trial Judge here has expressly found that there was an extremely high degree of skill and seamanship employed by the appellees, and the great weight of the evidence supports his view. Therefore, the absence of that factor from the *St. Charles* case, and its presence here, distinguishes the cases. Again, $15,000.00 was awarded in 1918, which, to be compared with an award this year, must be adjusted.

Appellants next cite *The Agwisun* (C. C. A. 2d), 49 F. (2d) 263. This case involved a tank vessel tied up at a repair dock. A fire broke out on deck, and the salvor came up promptly and played two hoses on the fire area. The opinion of the District Court, 43 F. (2d) 721, discloses that there were also present two fire boats and a land company. The Court said (p. 722):

> *"The service did not require a high order of skill,* but was rendered with promptitude and diligence."

In *The Egbert H.,* 131 F. (2d) 111, the statement of the Court will serve to distinguish it from this one:

> "The entire salvage operations consumed only fifteen minutes, and the towage value of the services rendered was $15.00. The risk to the Cynthia No. 2 and her crew was negligible, her inconvenience slight, *and she owed a legal duty to respond to the distress signal."*

The Bretanier (1920), 267 Fed. 178, involved a vessel grounded on soft bottom off the coast of Virginia. The salvage tug of Merritt & Chapman went to the scene,

and laid two heavy anchors, with the aid of which, the steamer was able to extricate herself. The Court judged the case on the basis of "the time employed and the values involved" (p. 179), having held that there was no danger to *either* vessel. Here, under the evidence, it cannot be seriously denied that there was imminent danger to the Pioneer on the rocks, and the Court found that there was also danger to the North Queen, which finding is supported by evidence. Nor was there any element of exceptional skill or seamanship present in the cited case.

In *U. S. v. Central Wharf, etc.* (C. C. A. 1st), 3 F. (2d) 250, the award was for $15,000.00 upon a salved value of $70,000.00. Of the $15,000.00, only 3/5, or $9,000.00 was awarded to the private salver, the other 2/5 being withheld for the services rendered in the salvage of a coast guard vessel. The case certainly does not support appellants' position.

The City of Portland, 298 Fed. 27 (1924), is wide of the mark. That case involved a vessel at New Orleans; she was being towed by two of libelant's tugboats when her propeller shaft snapped out and water entered the opening. The tugs beached her. The Circuit Court held that the services in beaching her were salvage, but the Court had this to say as to the measure of the *amount* of the award (p. 30):

> (Quoting from *The City of Haverhill* (D. C.), 66 Fed. 159. . . .) "This was an extraordinary service, because not within the scope or contemplation of the (towage) contract. It should therefore be compensated for on salvage principles. But the equitable relation of the parties in such cases, where the tow is all the time in charge of the tug, *requires I think, the allowance of a much less compensation than would be proper to be given to an independent tug.*"

Furthermore, the Court said (p. 301) that inasmuch as the accident happened in the harbor and the vessel was "in danger from possible, *but undisclosed,* perils of the sea, the allowance in this circuit to a salvaging tug usually has been fixed at double the towage rate." A decree was so computed. Can an award so computed be *fairly* compared with one under the facts of the *Pioneer* case?

Appellants' next cited case is *Holmes v. City of New York,* 30 F. (2d) 366, wherein the Circuit Court had this to say of the services rendered:

> "While the adventure came within the category of a salvage service, it involved little more in risk and effort than towage, and the fire was so slight that it did no real injury."

The Professor Koch, 260 Fed. 969, cited next, is likewise a case involving commercial tugboats. The District Court had this to say of the facts of the case (p. 970):

> "This completed the first stage of the salvage operations, which consisted in taking the barque from her position on Cox's Ledge to the position inside the breakwater. It was essentially a towing operation, not involving the use of wrecking apparatus or any special appliances, and not especially endangering the tugs—(the barque was then towed to Boston)—the per diem value of their services at their customary rates would have amounted to about $2,300.00. . . ."
>
> "The principles upon which the award is to be made are well established. Most of the elements which lead to large awards are conspicuously absent in this case. The libelant did not discover the wreck; it was notified over the telephone, and took the matter up in a business way.

> "Concisely stated, what the libelant did on April 30th was to receive word over the telephone that the barque needed assistance, to dispatch tugs promptly to the place of accident, . . . The case is very different from that of a vessel deviating from her voyage to render assistance, or struggling with a wreck in a stormy sea at risk of life."

The Court awarded $10,000.00, which was more than four times the commercial value of the tug's work.

The High Cliff (C. C. A. 2d), 271 Fed. 202, is next in point. The following language from the opinion serves to distinguish the case from that of the Pioneer (p. 204):

> "In the case now before the Court the value of the services rendered by the tug are to be distinguished from cases involving rescue of vessels in open water, accompanied by great danger to life and property, *or where the salvors display great daring or skill.*"

The Santa Barbara, 299 Fed. 152, involved a vessel in a harbor, aided by two tugboats when they pulled her away from a burning pier. Skill was required in the maneuvering of the tugs, and a $1,000.00 award was raised to $8,500.00. The Court made an analysis of the *fire* cases of salvage, in harbor. A reading of this case discloses that awards of from 10%, on lower salved values, to 5%, on values over $200,000.00 to $300,000.00, were customary. Considering that cases involving tugboats in harbors are the lowest on the salvage scale, the award in the *Pioneer* case compares favorably with these fire cases. Of course, appellees do not believe the percentage method is the proper method to either compute or compare an award. Percentage of award to salved value, as the Trial Judge said [A.

53-54], should not be left entirely out of consideration, but the award should not be on that basis alone.

The Peru, 99 Fed. 783, was decided in 1900. At that time, $2,500.00 to the tug for what was done was a handsome award—the case cannot be compared on its facts to the present one—certainly an adjustment in the value of the salvor would be first required.

The Niagara, 89 Fed. 1000, was decided in 1898. The $8,000.00 award must be considered according to the value of the salvor then. Also, the award was about 6½%, and if we increase the salved value to present day values, by multiplying by at least three, we have a salved value of around $350,000.00, upon which sum awards now have dropped to 6% in certain cases. But by the same figuring, the award today would be around $24,000.00.

In *The Labrador,* 39 Fed. 503, the Court said (p. 504):

> "The steamer herself was in peril, but there was no serious peril of the total loss of the cargo by fire. . . . In view of all the circumstances, I am unable to award salvage compensation to the McCaldin upon the theory that by her efforts nearly a million dollars was saved from destruction."

Appellee cites the following cases as more helpful in this case:

> *Dalzell v. Central Union Stockyards, et al.* (D. C. S. D. N. Y.), 1935 A. M. C. 1048, 12 F. Supp. 179.

Tug Dalzellea aided cattle barge damaged in collision in New York Harbor. Barge towed to dock, cattle unloaded, and barge towed to yard. Skillful manner in which Dalzellea closed hole in the hull of the barge. Salved value,

$86,404.00; value of Dalzellea, $65,000.00; award, $6,-000.00.

> "It is true that the entire operation in which the Dalzellea and her crew was engaged only lasted from about 7:55 to 11:30 A. M., and period of greatest danger lasted something less than 30 minutes. But the time element as a basis of award in an instance of this particular character is not the important factor; nor should this be looked upon as a mere harbor salvage where the risk to the salvor and the need of aid is ordinarily less urgent and the operation less dangerous than upon the high seas. The fact that the rescue was completed in a comparatively short time does not lessen the merit of service under the circumstances. *Connemara,* 108 U. S. 35; *West Mount,* 277 Fed. 168 (2 C. C. A.)."

The Commonwealth, 1932 A. M. C. 199 (D. C. W. D. Wash. N. D.). Distressed vessel pulled off reef. Salved value, $12,000.00; salvor, $7,000.00; $1,500.00 salvage award.

Rustad v. Wuori, 157 F. (2d) 448;

The Kia Ora, 252 Fed. 507 (1918) (C. C. A. 4th);

The Craster Hall, 213 Fed. 436;

The Clevelander, 1933 A. M. C. 1557 (D. C. E. D. N. Y.);

The Wahkeena (C. C. A. 9th), 56 F. (2d) 836;

De Aldamiz v. Theo. Skogland & Sons, 17 F. (2d) 873.

Conclusion.

Appellee submits that each salvage case must stand on its own facts, and that there is no controlling rule of thumb for measuring the award; that no formula can be devised which will meet the justice of every case. *The Craster Hall,* 213 Fed. 436. The percentage basis is unsatisfactory because its application to large values would lead to obvious injustice. *The Kia Ora,* 252 Fed. 507, 508. Where the values are small, the same result would follow.

The case rests within the sound discretion of the Trial Court, exercised according to law.

Appellee submits that the Court correctly applied authoritative standards and correct principles in determining the amount of the award; that there was no misapprehension of the facts; that there is no substance to the claim that the award here was grossly excessive; and that, therefore, the decree of the District Court should not be disturbed on appeal.

Appellee closes with the following quotation from *U. S. v. S. S. Balto,* 1929 A. M. C. 292 (2 C. C. A.):

> "In a careful opinion a competent trial judge has thoroughly considered the various elements which may properly be taken into account in rewarding salvage services. Under such circumstances an appellate court is loath to change an award unless it appears to be based upon incorrect principles, or a misapprehension of the facts, or seems so grossly excessive or inadequate as to be deemed an abuse of discretion. (Citing cases.) None of these conditions exist here. It would